Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 20, 2015

CLAIM NO. 201201516

AUSTIN POWDER COMPANY PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE**
ADMINISTRATIVE LAW JUDGE

BILLY KEITH STACY
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Austin Powder Company ("Austin Powder") appeals from the June 16, 2015 Opinion, Award and Order and the July 22, 2015 Order on Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ found Billy Keith Stacy ("Stacy") is entitled to a 50% disability award due to coal workers'

pneumoconiosis ("CWP"). Austin Powder argues the holding in Vision Mining Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011), requires that CWP cases be decided in the same manner as other claims involving pneumoconiosis. Seeking to extend the holding in Vision Mining, it asserts the provisions of KRS 342.732 and the special rules concerning entitlement to CWP benefits are unconstitutional. For the reasons set forth herein, we affirm.

Stacy was employed by Austin Powder from May 3, 2005 through April 6, 2012 as a blast hole drill operator. He testified he was exposed to rock and coal dust while operating the drill. Stacy worked ten hour shifts. Approximately eight hours of the shift were spent inside the cab of the drill. The other two hours were spent outside measuring where to drill the holes and shoveling to "stem" the holes.

Stacy filed his claim on November 1, 2012 alleging he became affected by CWP on April 16, 2012. He was fifty-nine years old at the time of his last exposure and had forty-two years of exposure. Stacy's claim was held in abeyance pending a decision in Vision Mining. Following the Court's decision in that case, the claim was removed from abeyance and Stacy amended his claim to include a pulmonary impairment.

Stacy supported his claim with an x-ray interpretation by Dr. Glen Baker, who found radiographic classification of Category 1/0. Austin Powder submitted an x-ray read by Dr. Bruce Broudy as negative, or Category 0. Dr. Broudy performed pulmonary function studies which revealed a pre-bronchodilator forced vital capacity ("FVC") of 63% and forced expiratory volume in one second ("FEV1") of 39%; and post-bronchodilator FVC of 70% and FEV1 of 43%. Pursuant to KRS 342.316, Dr. Byron T. Westerfield examined Stacy. He found Stacy suffers from CWP based upon an x-ray read as Category 1/0. Dr. Westerfield opined Stacy has a significant pulmonary impairment attributable in part to his CWP, significant history of smoking, asthma, and obesity. Pulmonary function studies revealed a pre-bronchodilator FVC of 71% and FEV1 of 48%, and post-bronchodilator FVC of 81% and FEV1 of 54%.

The ALJ found the report of Dr. Westerfield most persuasive and determined Stacy established the presence of CWP Category 1/0. The ALJ noted that, pursuant to KRS 342.732(2) and Watkins v. Ampak Mining, Inc., 834 S.W.2d 699 (Ky. App. 1992), he was required to use either the highest FVC value or the highest FEV1 value. The ALJ chose to rely on the highest FEV1 value of 54% found by Dr. Westerfield. Because the respiratory impairment evidenced by an FEV1 is

less than 55%, the ALJ determined Stacy is entitled to a 50% disability award.

Austin Powder filed a petition for reconsideration arguing Stacy's highest FVC would only entitle him to a 25% disability. It requested additional findings as to the reason the ALJ selected the FEV1 value rather than the FVC value. Additionally, Austin Powder asked for further findings regarding the constitutionality of KRS 342.316(3)(b) and (4)(d-f).

By order dated July 22, 2015, the ALJ overruled the petition for reconsideration. He noted Dr. Westerfield indicated inhalation of coal and rock dust is at least a significant contributing factor to Stacy's respiratory impairment. The ALJ explained the FEV1 value was used because it was abnormal and the doctors indicated Stacy had respiratory impairment. The use of the FVC would be inconsistent with the finding of a respiratory impairment. The ALJ again noted, pursuant to Watkins v. Ampak Mining, he had discretion to use either the FVC or FEV1 value.

On appeal, Austin Powder concedes that under KRS 342.732(2) and the prior decision in Newberg v. Chumley, 824 S.W.2d 413 (Ky. 2011), the ALJ's finding of a 50% disability is correct. However, it argues that the holding in Vision Mining requires that CWP claims be decided in the same

manner as other claims involving pneumoconiosis. It contends the special rules concerning entitlement for CWP benefits enunciated in Newberg v. Chumley, Watkins v. Ampak Mining, Inc. and KRS 342.732 are unconstitutional in light of the holding in Vision Mining. According to Austin Powder's reading of these cases, the ALJ is required to follow the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition and to conclude the FVC is the only relevant measurement of entitlement to disability. It contends the FEV1 cannot be used because it measures an obstructive defect as opposed to a restrictive defect caused by CWP.

The constitutionality issue is not properly preserved. Constitutionality of the statute was not listed as a contested issue in the January 14, 2015 Benefit Review Conference Order. At the hearing, the ALJ inquired as to whether the parties had reviewed the contested issues listed in the BRC order, and neither party noted additional issues. Austin Powder's brief before the ALJ did not address the issue. In fact, it first raised the issue in its petition for reconsideration. Finally, we note KRS 418.075 requires that notice be provided to the Attorney General in any proceeding which involves the constitutionality of a

statute. After reviewing the record, we can find no indication notice was ever given to the Attorney General.

Furthermore, as an administrative tribunal, this Board has no jurisdiction to determine the constitutionality of a statute enacted by the Kentucky General Assembly. Blue Diamond Coal Co. v. Cornett, 189 S.W.2d 963 (Ky. 1945). *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455, 464 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011). Likewise, an Administrative Law Judge lacks the power and jurisdiction to review and determine the constitutionality of the statute.

Austin Powder's appeal is not merely a request to apply the holding in Vision Mining to the facts of this case, but rather a request to have KRS 342.732 declared unconstitutional. In Vision Mining, the Supreme Court found an equal protection violation where claimants alleging CWP were held to a standard of proof different than claimants alleging any other type of pneumoconiosis. It found there was no real distinction between CWP and other forms of pneumoconiosis, thus differing standards of proof for the same disease and disparate treatment could not be justified as a cost-saving measure. As such, the procedure did not promote prompt and efficient processing of CWP cases. The Court explained:

> We cannot discern a rational basis or substantial and justifiable reason for the disparate treatment of coal workers in this instance. Pneumoconiosis caused by exposure to coal dust is the same disease as pneumoconiosis caused by exposure to dust particles in other industries, yet coal workers face different, higher standard-of-proof requirements than those other workers. This is an arbitrary distinction between similarly situated individuals, and thus it violates the equal protection guarantees of the Federal and State Constitutions.

The Court did not address the disability classes for CWP established in KRS 342.732, nor did it address KRS 342.732(2) which specifically provides:

> The presence of respiratory impairment resulting from exposure to coal dust shall be established by using the largest forced vital capacity (FVC) value or the largest forced expiratory volume in one second (FEV1) value determined from the totality of all such spirometric testing performed in compliance with accepted medical standards.

As explained above, we are without authority to extend the ruling in Vision Mining to the classifications of disability or to the ALJ's authority to choose between the FVC and FEV1 values as permitted in KRS 342.732(2).

Accordingly, the June 16, 2015 Opinion, Award and Order and the July 22, 2015 Order on Petition for

Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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